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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 923

PRESSED STEEL CAR COMPANY, INC., Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION OF PRESSED STEEL CAR COMPANY, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable, the Chief Justice of the United States and the Associate Justices Of the Supreme Court of the United States:

Petitioner, Pressed Steel Car Company, Inc., respectfully prays that a writ of certiorari be issued to review a judgment of the United States Court of Claims dismissing petitioner's petition thereto.

OPINION BELOW

The OPINION of the United States Court of Claims and a minor portion of its FINDINGS OF FACT (2 out of 34 findings) are reported at 157 F. Supp. 950, the remaining FINDING OF FACTS and CONCLUSION OF LAW are not officially reported. A copy of the OPINION, FINDINGS OF FACT and CONCLUSION OF LAW is appended hereto.

GROUNDS OF JURISDICTION

The judgment sought to be reviewed is a judgment of the United States Court of Claims entered January 15, 1958.

No order respecting a rehearing or granting an extension of time within which to petition for certiorari has been made.

The jurisdiction of this Court to review the judgment in question by writ of certiorari is conferred by Act of June 25, 1948, c. 646, 62 Stat. 928; 28 USC 1255(1).

QUESTIONS PRESENTED FOR REVIEW

A World War II war production (cost-plus-a-fixed-fee) contract between petitioner and the United States provided that the United States should reimburse petitioner for its direct costs and for a proper proportion of its indirect costs incurred in the performance of such contract. In language copied directly from then applicable joint regulations of the United States the contract defined the nature of such indirect costs and the proper method of their apportionment to performance of the contract, stating:

(a) that "expenses of administration" constituted an element of cost as a general expense of performance;

(b) that the term "expenses of administration", an indirect cost, comprehended expenses incident to and necessary to the performance of the contract incurred in connection with the "general administration" of petitioner's business; and

(c) that expenses of administration or "overhead" should be allocated to the cost of performance in accordance with a prescribed formula not here relevant.

The contract, also in the language of the joint regulations, stated expressly that (a) Federal and State income and excess profits taxes and surtaxes and (b) taxes on *issues* and *transfers* of caiptal stock should not be included as a cost of performance of the contract. *Significantly, it contained no provision for the complete exclusion from such cost of other taxes imposed upon petitioner.*

For the years 1942 to 1946, inclusive, comprising the major part of the period of performance of the contract, the Commonwealth of Pennsylvania imposed and collected from petitioner annual capital stock taxes exceeding, in the aggregate, $172,000. Petitioner's claim for reimbursement of $73,594.71 of such taxes so paid as an expense of the general administration of its business was calculated in accordance with the formula prescribed in the contract for the apportionment of expenses of administration to the cost of performance and such apportionment was certified to be fair and reasonable by the United States' contracting officer's representative.

While the contract made no express reference to Pennsylvania capital stock tax *eo nomine*, the uncontradicted testimony of the accountants who testified with respect to the proper accounting treatment of Pennsylvania capital stock taxes was that such taxes were an expense of the general administration of petitioner's business and had been so recorded by petitioner. In addition, the United States, through the War Department, in TM 14-1000, officially classified the Pennsylvania capital

stock tax in question as a reimbursable State franchise tax imposed by Pennsylvania upon its domestic corporations for the privilege of doing business in the corporate form and specified the formula to be followed in allocating taxes of such sort between costs of performance of cost-plus-a-fixed-fee contracts and other work of the contractor.

1. Under these circumstances may the Court of Claims "construe" the language of a cost-plus-a-fixed-fee contract in a manner directly contrary to the construction of such language officially placed thereon by the United States acting through the War Department, thus substituting its own theory as to the meaning of language which had already been construed (a) by the United States in an official directive of the War Department and (b) by petitioner in bringing its action on such contract in an attempt to recover on the basis of the War Department's official construction, with which construction, petitioner was in agreement?

2. Under these circumstances should the Court of Claims be permitted to depart completely from the usual and accepted course of judicial proceedings (a) by substituting its own construction of the meaning of the language of a contract for the construction placed upon such language by *both* of the parties to such contract and (b) also render a decision directly in conflict with its own prior decision as to the construction of such language in the same type of war production contract?

REGULATIONS INVOLVED

T.D. 5000, Internal Revenue Bulletin, Cumulative Bulletin 1940-2, pages 397-414. A copy of the pertinent parts is appended hereto.

STATEMENT OF THE CASE

Petitioner sued in the Court of Claims to recover $73,594.71, plus interest thereon, which should have been but was not reimbursed to petitioner under a war production ("cost-plus-a-fixed-fee") contract (the contract) with the United States. The principal sum of the claim involved in such action constituted a part of the much larger amount of Pennsylvania capital stock taxes paid to the Commonwealth of Pennsylvania for the years 1942 to 1945, inclusive, during all of which time petitioner was engaged in performance of such contract. Performance under the contract also took place during part of the year 1941 but no claim was asserted under the contract with respect to the Pennsylvania capital stock tax paid for such year. During the period of performance petitioner, a Pennsylvania corporation, had its principal executive offices in Pennsylvania and operated two plants, one in Pennsylvania and the other in Illinois, where production under the contract took place.

The contract, as amended and supplemented, provided for (a) production of (and petitioner produced under it) approximately 10,000 armored motor vehicles (mostly armored tanks), (b) reimbursement by the United States to petitioner of its costs incurred in such production and (c) payment to petitioner of a fixed fee

per unit of production. The pertinent reimbursement provisions of the contract were substantially identical with those specified by the Secretaries of the War, Navy and Treasury Departments of the United States in Section 26.9 of TD 5000, CB 1940-2, pages 397 et seq., having been copied almost verbatim from TD 5000.

The contract was terminated by and for the convenience of the United States and production thereunder ceased at December 31, 1945, pursuant to notice of termination given by the United States to petitioner dated October 10, 1945.

Thereafter negotiations between the United States and petitioner ensued looking towards settlement of petitioner's termination claims under the contract, including that of petitioner to be reimbursed for a portion of Pennsylvania capital stock taxes incurred and paid by it for the years 1942 to 1945. At the suggestion of the United States, petitioner's termination claim with respect to reimbursement of part of its Pennsylvania capital stock taxes for such years was submitted to the United States in the form of a "public voucher" addressed to its Comptroller General (such form being then in common use as an appropriate means of obtaining rulings by the Comptroller General upon disputed claims under war production contracts). Such public voucher, certified on behalf of the United States by its contracting officer's representative as to the facts that petitioner had paid the taxes involved and that *the allocation thereof, as set forth in such public voucher, to performance of the contract was fair and reasonable*, was sent to the Chicago Ordnance District, was thence dispatched by such District to the Office of Chief of Ordnance, Washington, D. C. for submission to the

Comptroller General, *but was not submitted by the Office of Chief of Ordnance to the Comptroller General* for a ruling.

Such public voucher was held in the office of the Chief of Ordnance until October, 1947 and was then returned to the Chicago Ordnance District on or about October 8, 1947. In the interval from June, 1946 to October, 1947 petitioner and the United States negotiated and executed Supplement 104 dated November 27, 1946 to the contract, settling all matters concerned with petitioner's performance and reimbursement under the contract, except (a) petitioner's claim for reimbursement for a portion of its 1942-1945 Pennsylvania capital stock taxes and (b) certain other matters not here involved. Supplement 104 expressly provided that such excepted claim for reimbursement was limited to the sum of $73,594.71 and that it was to be the subject of a ruling by the Comptroller General of the United States.

Notwithstanding the express provision of Supplement 104, petitioner's claim, submitted in the form of such public voucher, was not sent on to the Comptroller General of the United States for a ruling and, upon return of such public voucher to the Chicago Ordnance District, the contracting officer, under date of February 9, 1948, purported to make a finding and decision that petitioner's claim for reimbursement was denied. Petitioner, thereupon, acting under the mistaken belief that the Comptroller General of the United States had refused to rule on its claim, brought its action in the Court of Claims.

At pre-trial in the Court of Claims it was for the first time disclosed to petitioner that its public voucher

had not been submitted to the Comptroller General at all. In an attempt at that time to settle the case by agreement of the parties, petitioner's claim was then formally submitted through the then Secretary of the Army to the Comptroller General, but the latter refused to rule on it. The case then proceeded to trial.

The dispute concerns (a) the proper construction of that portion of the language of the contract which defines a specific class of the many costs entering into the performance of the contract and (b) the determination as to whether the particular cost here involved is within such specific class so defined.

Because of the great variety of costs incurred in the operation of the complex business activities of this nation's industries the accounting profession, including its industry members as well as those who are or were officers or employees of the United States, has over a long period of years developed a well-recognized and well-understood system of nomenclature describing and defining general classifications and many subdivisions of such costs. The contract here involved furnishes an excellent illustration of the use of such system of nomenclature which, in this case, was expressly approved on behalf of the United States for use in war production contracts between the United States and its suppliers (TD 5000, supra). Such contract, in accordance with such system, defines the general classifications of reimbursable costs and then subdivides such general classifications into several major and minor subdivisions. It must be noted that each subdivision, whether major or minor, is comprehended within the definition of the general classification from which it is derived.

The Court of Claims ignored this well-recognized system of nomenclature in disregard of its Commissioner's report, even though it incorporated most of the findings set forth in such report in its own Findings of Fact. It treated the language of the contract as though it were the unique phrasing of a contract of first impression which had been completely negotiated *de novo* by petitioner with officers of the United States who had no background on the subject nor any guideposts, fixed by their governmental superiors, to follow in phrasing the provisions of the contract. The fact was that the language was prescribed by then existing regulations of the United States (TD 5000, supra) and the contract was written, at least in so far as the matter here involved is concerned, in the language of such regulations (ibid.).

As a guide for decision the Court of Claims also had in the record before it and incorporated in its Findings of Fact (Finding 34) the construction placed upon the pertinent language by the United States itself (TM 14-1000). The Court of Claims nevertheless, construed the language of the contract in a manner precisely contrary to that in which, it found as a fact, the United States itself had officially construed such language and which was the same as that for which petitioner contends.

Jurisdiction of petitioner's claim against the United States was conferred upon the Court of Claims by Act of March 3, 1911, c. 231, Section 145, 36 Stat. 1136; 28 U.S.C., 1940 ed., Section 250(1), (substantially reenacted by the Act of June 25, 1948, c. 646, 62 Stat. 940; 28 U.S.C., 1946 ed., 1491), which provided in pertinent part as follows:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims * * * founded * * * upon any contract, express or implied, with the Government of the United States, * * *".

ARGUMENT

This is a most peculiar case. It is *peculiar* in the sense that the Court of Claims seemingly was induced by the contentions advanced on behalf of the United States to make the following completely erroneous assumptions:

(a) that it had never previously been called upon to construe substantially identical, or even remotely similar, language of any World War II war production (cost-plus-a-fixed-fee) contract, although in one of its earlier cases involving a similar war production contract (*North American Aviation, Inc. v. United States*, 67 F. Supp. 1007 (1946)) it had had before it for decision the problem of construing just such language;

(b) that the "particular provisions as were written in the contract, and the contract as a whole" (Appendix p. 2, first paragraph) were unique, unusual, previously unheard of and strange in such World War II contracts, although, as a matter of fact, such "particular provisions" were for all practical purposes verbatim copies of the provisions prescribed for such contracts under joint regulations (in effect throughout the entire period of negotiation and performance of the contract here involved) of the Secretaries of the War, Navy and Treasury

Departments of the United States (T.D. 5000, supra); and

(c) that such "particular provisions" (ibid.) had not been expressly construed by the United States (TM 14-1000, supra) in the manner in which petitioner asserted in the Court of Claims that it should be (but was not) construed by such Court.

In the *North American Aviation case,* supra, the Court of Claims had before it the problem as to whether the Federal capital stock tax incurred by plaintiff was a reimbursable cost under a war production contract couched in the language, as was the contract here involved, prescribed under Section 26.9 *(a), (g)*(4) and *(j)* of T.D. 5000 (Appendix pp. 6-8). The Court of Claims there held that the inferences to be drawn from the use of such language, particularly the express exclusion of Federal and State income and profits taxes as well as certain other specified types of taxes (i.e., taxes on issues and transfers of corporate stock) were (a) that the Federal capital stock tax was an allowable reimbursable item of cost, (b) that it was not among the items of cost of performance to be excluded and (c) that the parties to the contract and the contract itself intended that the capital stock tax should be and was an allowable item of reimbursable cost (see 67 F. Supp. at page 1015).

While the officers (called as witnesses for the United States) who conducted the negotiation of the contract here involved testified that they had no knowledge of the Pennsylvania capital stock tax and that in the course of such negotiations such tax was not discussed, it was admitted that the form of contract which was to be and actually was negotiated was furnished by the Chief of

Ordnance with instructions to negotiate the contract in such form. It was also testified on behalf of the United States that there was no discussion of the Federal capital stock tax or of the Illinois franchise tax.

In the *North American Aviation* case, supra, the Court of Claims refers to the actual knowledge of the parties to that war production contract of the existence of the Federal capital stock tax, pointing out that such Federal tax had been in effect for more than eight years prior to the adoption of T. D. 5000, infra, and the subsequent execution of such war production contract. *In the instant case the Pennsylvania capital stock tax had been in effect since 1879, or more than sixty years before T.D. 5000 was published and more than sixty-one years before the contract with petitioner was executed.* (Appendix, pp. 9-11, 23 et seq). If the United States had had any idea that it could possibly show that it was unaware of the existence and nature of the Pennsylvania capital stock tax it might perhaps have called as witnesses the Chief of Ordnance or members of his legal staff who prepared the form of contract, whose testimony denying any knowlege by the United States of such tax would have been completely incredible.

No doubt the testimony adduced by the United States as to the lack of knowledge of the "negotiating" officers with respect to the existence and nature of the Pennsylvania capital stock tax was intended to present reasons for differentiating the instant case on its facts from the *North American Aviation* case, supra. However, let it be assumed that the facts were as testified, that the "negotiating" officers had no knowledge on the subject and that there was no discussion, in the course

of the negotiations, of the question as to whether Federal and Pennsylvania capital stock taxes or any portion of them were intended to be reimbursable costs under the contract. This would be the most favorable position that could, and perhaps should, be taken in reviewing the decision of the Court of Claims. *But such assumption becomes completely irrelevant if not meaningless with respect to the issue involved here, because there is in the record, and the Court of Claims made a specific Finding of Fact thereon, incontrovertible documentary evidence, that the United States had itself construed the language of the contract in the manner claimed here and below by petitioner.*

The language above referred to is that which is reproduced as a part of the Opinion of the Court of Claims and reads as follows (Appendix, p. 2):

> "The pertinent provisions of the contract relating to reimbursement appear in our findings 6 and 7. In Title IV, Article IV 1 (a) (1) headed "General rule" it is said that—
>
> > the proper proportion of any indirect costs (including therein a reasonable proportion of management expenses) incident to and necessary for the performance of this contract
>
> is reimbursable. Under Article IV 1 (a) (7) headed "Expenses of distribution, servicing and administration" it is provided that, *inter alia*, the cost of "the general administration of the business, such as" a list of named kinds of expenses, one item of the list being "other expenses" is reimbursable."

The Finding of Fact referred to above containing such incontrovertible documentary evidence of such

construction of such language is Finding of Fact 34 (Appendix pp. 21-22). In such Finding of Fact there is reproduced verbatim the pertinent text of an amendment dated September 14, 1945 (erroneously referred to in such Finding as September 1, 1945) to War Department Technical Manual, TM 14-1000, approved March 1, 1944, entitled "Administrative Audit Procedures for Cost-Plus-A-Fixed-Fee Supply Contracts" in which the War Department, acting through the Adjutant General, classifies the Pennsylvania capital stock tax as a State "franchise" tax, states that it shall be treated as a reimbursable cost under contracts of the kind here involved—cost-plus-a-fixed-fee contracts, and specifies the formula to be followed in allocating such tax as between work under such CPFF contracts and other work performed by the contractor, i. e. on the basis of allocation of the general administrative expenses of the contractor.

Official action by the United States with respect to the construction of the relevant language of the contract here involved was not limited to that taken on its behalf by the War Department. On October 25, 1945 the Comptroller General of the United States also issued a decision on the subject matter: 4 Bull. J. A. G. A. 469 (November, 1945) in which he expressly refers to the September 14, 1945 amendment to TM 14-1000. The following is an excerpt from the digest of such decision:

> "It is assumed that (1) franchise taxes are not expressly excluded by the contract as an element of cost, (2) the record of negotiations leading up to the execution of the contract does not indicate that the fixed fee was intended to cover

such tax, and (3) the mentioned pars. 266 and 267 are intended to apply only to such contracts as either specifically mention franchise taxes as reimbursable items of cost, provide for the reimbursement of cost on the basis of the provisions of section 26.9 of Treasury Decision 5000, or contain reimbursement provisions substantially similar to those appearing in War Department Contract Form No. 12."

The foregoing decision was not in evidence as part of the record before the Court of Claims, but since it is contained in an official publication of the United States it is assumed that it is a matter as to which this Honorable Court may at least take judicial notice if not treat as being of equal stature with officially reported actions of the Treasury Department and other branches, including courts, of the United States.

It might be contended by the United States, although petitioner would consider any such contention utterly senseless, that the treatment of petitioner's claim by the contracting officer (Finding of Fact 23; Appendix pp. 15-16) indicated the possibility that the pertinent language of the contract might be construed properly in some manner other than that officially approved by the War Department in TM 14-1000. It seems quite obvious, however, that no weight at all can be given to a construction of language by a subordinate officer of the War Department when such construction is directly contrary to an express official directive of the War Department itself.

Considered in the light of the Findings of Fact made by the Court of Claims it is difficult—petitioner considers it impossible—to reconcile the reasoning of the Court

below in ordering dismissal of the proceeding with its statement that its only ground for such decision, as expressed in its Opinion (Appendix, p.2, first paragraph) was that it was faced with the problem of construing the language of the contract for the purpose of ascertaining the intention of the parties thereto as to whether a particular item of cost should be reimbursed. It found as a fact, however, that the United States through the War Department (years prior thereto) had officially and expressly placed a particular construction on such language. It proceeded, nevertheless, to construe such language, on its own so to speak, in a manner directly contrary to such official express construction thereof by the War Department, and decided, on the basis of its own construction of such language and its own inference therefrom as to the intention of the parties, that petitioner was not entitled to recover. Petitioner's contention below was, of course, that it understood the relevant language to mean the same thing as it had been officially construed as meaning by the War Department and was, therefore, entitled to recover.

There have grown up a number of practical rules of law concerning the construction of written (integrated) contracts. Two of these rules are particularly pertinent here. The first of these rules, set out in Section 235(e) of the Restatement of the Law of Contracts (Volume I, pp. 319, 326 and 327), is that where the conduct of the parties to the contract subsequent to its execution indicates that they placed a particular interpretation upon the language used in the contract the meaning attributed to such language by the parties should be followed by any court if a reasonable person could attach such interpretation to such language. The

second of such rules, set forth in Section 236(d) of such Restatement (ibid., at pages 327, 330 and 331), is that language of a contract shall be most strongly interpreted against the party using it; in this case the United States. See also *Corbin on Contracts,* Volume III, Section 558, pages 141, et seq. and *Williston, Treatise on the Law of Contracts,* rev. ed., 1936, Volume III, Sections 621 and 623, pages 1788, et seq., 1791, et seq. Such text writers are in accord with the rules given in the Restatement, supra.

In the instant case, the form of the contract was basically in language used by the United States (See T.D. 5000; Appendix, pp. 23 et seq.) and the United States officially construed or interpreted the meaning of such language (See TM 14-5000, supra, Finding of Fact 34; Appendix, pp. 21, 22).

If standards of construction of contracts are to exist at all, certainly the court should make some slight attempt to comply with such standards.

Respectfully submitted,

PRESSED STEEL CAR COMPANY, INC.,
Petitioner

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APPENDIX

IN THE

United States Court of Claims

(Decided January 15, 1958)

PRESSED STEEL CAR COMPANY, INC. v. THE UNITED STATES

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues for $73,594.71 plus interest thereon which, it says, should have been but was not reimbursed to it when it was paid for a cost plus fixed fee contract with the Government. The amount in question was paid by the plaintiff to the Commonwealth of Pennsylvania pursuant to the provisions of the Pennsylvania Capital Stock Tax Act of June 7, 1879, as amended.

The plaintiff was, during the years of the performance of the contract here in question, a Pennsylvania corporation, with its executive offices in Pittsburgh and two manufacturing plants, one in Pennsylvania and one in Illinois. In 1941 the plaintiff made a contract with the Government to manufacture 900 Medium Tanks, M–4. The contract was, in succeeding years, amended and supplemented and performance continued until December 31, 1945. The plaintiff produced, in all, 10,000 tanks. The contract contemplated performance in, and was in fact performed in, the plaintiff's Illinois plant.

As we have said, the contract was a cost plus fixed fee contract. It contained voluminous provisions as to what costs should, and what should not, be reimbursable by the Government. None of the provisions, affirmative or negative, was plainly applicable to the Pennsylvania Capital Stock Tax here in question. Our task is, then, to construe such particular provisions as were written in the contract, and the contract as a whole, to determine whether the tax was reimbursable.

The pertinent provisions of the contract relating to reimbursement appear in our findings 6 and 7. In Title IV, Article IV 1 (a) (1) headed "General rule" it is said that—

> the proper proportion of any indirect costs (including therein a reasonable proportion of management expenses) incident to and necessary for the performance of this contract

is reimbursable. Under Article IV 1 (a) (7) headed "Expenses of distribution, servicing and administration" it is provided that, *inter alia*, the cost of "the general administration of the business, such as" a list of named kinds of expenses, one item of the list being "other expenses" is reimbursable. Article IV 1 (a) (9) and its subdivision *c* provided for the allocation of administrative expenses in the proportion which the direct cost of the contract work bears to the direct cost of all of the contractor's work. The provisions referred to above are, of course, orthodox provisions for cost accounting.

The Pennsylvania Capital Stock Tax, the reimbursability of which is here in question, is based primarily upon the value, not of the corporation's assets, but of its capital stock. That value is its selling price at the end of the tax year, provided that such value is not less than its average selling price during the year, not less than the value which it should have had in view of its earnings for the year, and not less than the stock value indicated by the intrinsic value of its tangible property and assets, its good will, its franchises and privileges "as indicated by the material results of their exercise" taking into account also the amount of the corporation's indebtedness. We have reproduced the statute in finding 11.

In *Commonwealth* v. *Union Shipbuilding Co.*, 271 Pa. 403,

the Supreme Court of Pennsylvania held that when a corporation had manufacturing plants in Pennsylvania and in Maryland, it was proper for the Pennsylvania taxing authorities to apportion the total value of the corporation's stock between the value of the assets of the corporation in Pennsylvania and those in Maryland, and assess the Pennsylvania tax against only the Pennsylvania proportion of the whole value of the capital stock. The tax in question in the instant case was assessed and paid on that basis. That would mean, roughly, that, to the extent that the profits made by the Illinois operation were proportionate to the physical assets in Illinois, the effect of those profits in setting the market price of the corporation's stock, and hence its value for tax purposes, would be eliminated in determining the amount of the Pennsylvania tax.

The Pennsylvania Capital Stock Tax paid by the plaintiff was, then, based roughly upon that part of the market value of the corporation's stock which was created by the profits made by the operations of the corporation's plant in Pennsylvania and the value of the physical assets of its plant in Pennsylvania. The corporation's rented office space in the Koppers Building in Pittsburgh, and the furnishings of the office, would have little effect upon the value of its stock. Any money of the corporation in Pennsylvania banks, or securities owned in Pennsylvania might have affected the market value of the stock.

The Pennsylvania plant of the plaintiff, and the profits made by the operation of that plant, and money or securities owned by the plaintiff in Pennsylvania had no relation to the performance of the plaintiff's contract with the Government, or the cost of that performance. It is not conceivable that if the parties, in negotiating the terms of the contract, had put their minds upon the question which faces us here, and had analyzed the nature and operation of the Pennsylvania Capital Stock Tax, they would have agreed that it should be a reimbursable cost of the performance of the Illinois contract. The language of the contract is, at best, barely susceptible of an interpretation which would include this tax as a reimbursable cost. We should not so interpret it as to make a contract for the parties which, we are satisfied, they would not knowingly have made for themselves.

The plaintiff urges that the tax was of the nature of a franchise tax, the payment of which was necessary to preserve the plaintiff's corporate existence. The tax statute does not so indicate. It would seem that the effect of non-payment would be the same as the effect which non-payment of any other tax would have. As early as 1882 the Supreme Court of Pennsylvania held that the Capital Stock Tax is a tax upon the property and assets of the corporation, although the value of the capital and assets is arrived at by ascertaining the value of the capital stock. *Commonwealth* v. *Standard Oil Co.*, 101 Pa. 119, 145. It is not a franchise tax.

The plaintiff is not entitled to recover and its petition will be dismissed.

It is so ordered.

REED, *Justice* (Ret.), sitting by designation; WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner Paul H. McMurray, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff, Pressed Steel Car Company, Inc., was, during the period from December 1, 1941, to December 31, 1945, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and had its principal executive office at 2500 Koppers Building, Pittsburgh, Pennsylvania, and its two manufacturing plants at McKees Rocks, Neville Island, near Pittsburgh, Pennsylvania, and Hegewisch, Chicago, Illinois, respectively.

In the course of successive mergers with wholly-owned subsidiaries, plaintiff, as the surviving corporation in the case of such mergers, has become a corporation organized and existing under the laws of the State of Delaware and has changed its name to and now is known as "U. S. Industries, Inc."

2. On or about August 21, 1941, defendant transmitted to plaintiff a "letter of intent" with respect to an order to be placed by defendant with plaintiff for the supplying by plaintiff of 300 Medium Tanks, M–4. The terms of such

letter of intent were accepted by plaintiff under date of August 13, 1941.

Pursuant to the letter of intent, plaintiff and defendant executed the written contract on November 12, 1941. The contract was approved on behalf of the Secretary of War December 17, 1941.

3. Following receipt of the letter of intent, plaintiff commenced performance of the work contemplated and also rehabilitated its Hegewisch Plant for the production of the materiel covered by the proposed contract, trained personnel, and proceeded to produce the material which would be needed.

After formal approval of the original contract performance continued under its terms, as amended and supplemented, until December 31, 1945, during which period of time some 10,000 vehicles were produced.

4. Amendments and supplements to the contract were in writing and designated Supplements Nos. 1 to 107, inclusive. Supplements 1 to 103 and 105 to 107 provided in substance for the production of materiel additional to that originally covered by the contract, made changes (1) in quantities of materiel to be produced, (2) in estimated costs and (3) with respect to various other aspects of the contract. These changes are not material to the claim in issue in this proceeding. Such supplements do not contain provisions affecting the obligation of defendant under the contract to reimburse the plaintiff for the cost of performance of the contract, as amended and supplemented.

5. The contract as amended was what is commonly known as a "cost-plus-a-fixed-fee contract." It provided in general for the performance of the work by plaintiff, that defendant would reimburse plaintiff for costs incurred in such performance and that defendant would pay plaintiff a fixed fee per unit of production. A separate fixed fee of $1 was provided as compensation for services performed by plaintiff in connection with the rehabilitation and equipping of plaintiff's Hegewisch Plant where production under the contract was to take place.

6. Article IV–A of Title IV of the contract deals, in pertinent part, with the subject of costs to be reimbursed by defendant, as follows:

TITLE IV

COST OF THE WORK UNDER TITLES I AND III

ARTICLE IV—REIMBURSEMENT FOR COSTS

1. The Contractor shall be reimbursed in the manner hereinafter described for its costs and in the performance of the work under TITLES I and III hereof, as approved or ratified by the Contracting Officer, determined in accordance with the following provisions:

(a) Cost of performing this contract.

(1) *General rule.*—The cost of performing this contract shall be the sum of the direct costs including therein expenditures for materials, direct labor and direct expenses incurred by the Contractor in performing this contract; and the proper proportion of any indirect costs (including therein a reasonable proportion of management expenses) incident to and necessary for the performance of this contract.

(2) *Elements of cost.*—In general, the elements of cost may be defined for purposes of this contract as follows:

a. Manufacturing cost, which is the sum of factory cost (see paragraph (3) of this section) and other manufacturing cost (see paragraph (4) of this section);

b. Miscellaneous direct expenses (see paragraph (5) of this section);

c. General expenses, which are the sum of indirect engineering expenses, usually termed "engineer-overhead" (see paragraph (6) of this section) and expenses of distribution, servicing and administration (see Paragraph (7) of this section).

(3) *Factory cost.*—Factory cost is the sum of the following:

* * * * *

f. Indirect factory expenses.—Items usually termed "factory overhead", which are not directly chargeable to the factory cost of performing this contract but which are properly incident to and necessary for the performance of this contract and consist of the following:

* * * * *

iv. *Fixed charges and obsolescence.*—The prorata share of recurring charges with respect to property used for manufacturing purposes of this contract, such as premiums for fire and elevator insurance, property taxes, rentals and allowances for depreciation of such property.

* * * * *

(4) *Other manufacturing cost.*—Other manufacturing cost as used in paragraph (2) of this section includes

items of manufacturing cost which are not properly or satisfactorily chargeable to factory cost (see paragraph (3) of this section) but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing this contract.

* * * * *

(7) *Expenses of distribution, servicing and administration.*—Expenses of distribution, servicing and administration, which are treated in this section as a part of general expenses in determining the cost of performing this contract (see paragraph (2) of this section), comprehend the expenses incident to and necessary for the performance of this contract, which are incurred in connection with the distribution and general servicing of the Contractor's products and the general administration of the business, such as—

a. Compensation for personal services of employees. * * *.

b. Bidding and general selling expenses. * * *.

c. General servicing expense. * * *.

d. Other expenses. * * *.

i. * * *.

ii. Allowances for interest on invested capital are not allowable as costs of performing this contract.

iii. Among the items which shall not be included as a part of the cost of performing this contract or considered in determining such cost, are the following:

* * * * *

Federal and State income and excess profits taxes and surtaxes; * * *

* * * * *

(9) *Allocation of indirect costs.*—No general rule applicable to all cases may be stated for ascertaining the proper proportion of the indirect cost to be allocated to the cost of performing this contract. Such proper proportion depends upon all the facts and circumstances relating to the performance of this contract. Subject to a requirement that all items which have no relation to the performance of this contract shall be eliminated from the amount to be allocated, the following methods of allocation are outlined as acceptable:

* * * * *

c. Administrative expenses (or "overhead").—The allowable expenses of administration (see paragraph (7) of this section) or other general expenses except indirect engineering expenses, bidding and general selling expenses, and general servicing expenses shall ordinarily be allocated or distributed to the cost of per-

forming this contract on the basis of the proportion which the manufacturing cost (see paragraph (2) of this section) attributable to this contract bears to the total manufacturing cost during the period within which this contract is performed.

* * * * *

(10) Such other items, not enumerated above, whether of a similar or dissimilar nature, which in the opinion of the Contracting Officer are properly chargeable to the cost of the work under this contract. When such item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

7. In this contract there are only three express provisions relating to taxes. They are the provisions for the reimbursability (1) of "property taxes" as recurring charges with respect to property used for manufacturing purposes; (2) "payments to unemployment, old age and social security, Federal and State funds" as miscellaneous indirect factory expenses and (3) for the nonreimbursability as distribution, servicing and administration expenses of "Federal and State income and excise profit taxes and surtaxes" and "taxes and expenses on issues and transfers of capital stock".

8. There is no specific provision in the contract as originally drawn for the reimbursability of Pennsylvania Capital Stock Taxes by name or description and there is no specific mention of, or reference to, the Pennsylvania Capital Stock Tax anywhere in the original contract.

9. As of November 27, 1946, plaintiff and defendant entered into Supplemental Settlement Agreement No. 104, providing for the settlement of all controversies which had arisen under the contract except for the matter involved in this litigation.

With respect to the matter involved in this litigation, Supplement 104 provided as follows:

SUPPLEMENTAL SETTLEMENT AGREEMENT NO. 104

* * * * *

ARTICLE 3. (*a*) * * *

(*b*) In addition, upon execution of this Agreement, the Government agrees to pay to the Contractor the sum of $73,161.48, representing the sum of $7,314,301.48, less the sum of $7,241,140.00, representing all unliq-

dated partial or progressive payments previously made on account to the Contractor or its assignee and all unliquidated advance payments (with interest, if any, thereon). All applicable property disposal credits have been previously paid to or credited to the Government by the Contractor. All interest to which the Contractor is entitled under the Act to the date of payment is included in said sum of $73,161.48, or, to the extent not so included, is expressly waived by this Agreement. Said sum, together with all other sums heretofore paid, constitutes payment in full and complete settlement of the amount due the Contractor by reason of the termination of work, or otherwise, under the Contract and of all other claims of the Contractor under the Contract and under the Act, in so far as it pertains to the Contract, except as hereinafter provided in this Article and in Article 4.

(c) Upon payment of said sum of $73,161.48 as aforesaid, all rights and liabilities of the parties under the Contract and under the Act, in so far as it pertains to the Contract, shall cease forthwith and be forever released except:

* * * * *

(11) All rights and obligations of the parties, if any, with respect to the Pennsylvania Capital Stock Tax, not to exceed $73,594.71, which item is subject to a ruling by the Comptroller General. Payment to the Contractor will be subject to the ruling of the Comptroller General.

10. It appears that Supplement 104 contained the above quoted provision with respect to plaintiff's claim for reimbursement for a portion of the Pennsylvania Capital Stock Taxes because at the time of the execution of this supplement that item was still in dispute. All other questions were settled between the parties and Supplement 104 reflected their agreement. Neither plaintiff nor defendant was willing to recede from its position with respect to the item of Pennsylvania Capital Stock Taxes but they did agree on a method of settling the item, namely, by referring it to the Comptroller General.

11. The Pennsylvania Capital Stock Tax Act of June 7, 1879, as amended, and in force in Pennsylvania during the years of the performance of this contract, 1941–1945, is as follows:

SECTION 20. That hereafter, except in the case of corporations of the first class, nonprofit corporations, and cooperative agricultural associations not having capital stock and not conducted for profit, banks, savings institutions, title insurance, or trust companies, building and loan associations, and foreign insurance companies, it shall be the duty of every corporation having capital stock, every joint-stock association, limited partnership, and every company whatsoever, now or hereafter organized or incorporated by or under any laws of this Commonwealth, and of every corporation, joint-stock association, limited partnership and company whatsoever, now or hereafter incorporated or organized by or under the law of any other State or Territory of the United States, or by the United States, or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership or joint-stock association, company or corporation whatsoever, association or associations, copartnership or copartnerships, person or persons, or in any other manner, to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

First. The amount of its capital stock at the close of the year for which report is made, together with the highest selling price per share, and the average selling price thereof during said year.

Second. Its debt account.

Third. Its income account, together with the disposition of any net income, and its profit and loss statement.

Fourth. Its general balance sheet.

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth and value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal, in the manner hereinafter provided, of the capital stock of the said corporation, company, joint-stock association, or limited partnership, at its actual value in cash as it existed at the close of the year for which the report is made.

The affidavit of two of the officers of such corporation, limited partnership, joint-stock association or company, shall be attached to said report. Such affidavit shall be

in the form required by the Department of Revenue, but shall state, in addition to any other averments required by the department, that, with fidelity and according to the best of their knowledge and belief, the affiants have estimated, valued and appraised, as shown in said report, the capital stock of the said corporation at its actual value in cash as it existed at the close of the year for which report is made; not less, however, than, first, the average which said stock sold for during the year; and second, not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends, expended in betterments, or carried into the surplus or sinking fund; and third, not less than the actual value indicated or measured by consideration of the intrinsic value of its tangible property and assets, and of the value of its good will and franchises and privileges, as indicated by the material results of their exercise, taking also into consideration the amount of its indebtedness.

The time for filing reports may be extended; taxpayers may be permitted to file their reports on a fiscal year basis; the procedure in case the Department of Revenue is not satisfied with the appraisement made by the officers of the taxpayer, and the penalties for failing to file reports and pay taxes shall be as prescribed by law.

SECTION 21. (a) That every domestic corporation, other than corporations of the first class, nonprofit corporation, and cooperative agricultural associations not having capital stock and not conducted for profit, and every joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to, and pay into the Treasury of the Commonwealth annually, through the Department of Revenue, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said twentieth section.

12. Plaintiff's officers and attorneys were cognizant of the Pennsylvania Capital Stock Tax from the time of plaintiff's organization in 1936 and were familiar with the manner in which it had been imposed and was to be determined and computed. They were also aware of the fact that the corporation was permitted and required by the statute to declare the value of its capital stock as the basis for the capital stock tax for one-year periods at the rate specified.

13. The contracting officer, then Col. Donald Armstrong, was familiar with the policy of the defendant to keep costs of the performance of contracts as low as possible. He was instrumental in eliminating the Illinois sales tax before the contract was signed, and in limiting the cost of administrative salaries, travel, and communication, particularly long distance telephone calls.

Plaintiff checked the proposed contract with respect to the reimbursability of costs and insisted upon, and obtained, from defendant's contracting and negotiating officers, the elimination of a provision which states that extraordinary expenses due to strikes or lockouts were not reimbursable.

On November 7, 1941, the final draft of the contract was sent to plaintiff's lawyer, Mr. C. M. Thorp, Jr. by defendant. He was asked to examine it and, if he had any further suggestions, to communicate with defendant's legal officers by wire or telephone. No further suggestions were received by defendant prior to execution of the contract.

14. The contract was executed in Chicago, Illinois, on November 12, 1941 by Col. Donald Armstrong, contracting officer for defendant, and by Mr. J. F. MacEnulty, president of plaintiff's corporation, and bears the signature of plaintiff's attorney, C. M. Thorp, Jr., as witness. The executed contract was in final form and approval, without change, was accomplished on December 17, 1941 by the Under Secretary of War.

15. During the period of time, August 2, 1941, to August 31, 1942, during which defendant's contracting officer, Col. Donald Armstrong, and the members of his legal staff were in charge of the negotiations for the execution and the performance of the contract, the plaintiff, through its officers and attorney, who were dealing with defendant's officers, made no specific reference to Pennsylvania Capital Stock Taxes or the subject of reimbursability of such taxes.

16. In reports covering Pennsylvania Capital Stock Tax for 1941-1945 inclusive, plaintiff accounted for property and monies received from defendant relating to the contract in suit and in which plaintiff valued its capital stock upon its net earnings or profits principally derived from defendant upon the contract in suit and upon the value of its tangible property and assets, including those received by it from de-

fendant at its Illinois plant and used there. The Pennsylvania Capital Stock Tax, measured by these values, was computed and paid. It does not appear that plaintiff consulted with defendant in arriving at any of the computations of its capital stock taxes for the years above mentioned, which involves a portion of the tax which plaintiff now seeks to recover.

17. Prior to January 25, 1944, and after two full years of its operation of its Hegewisch plant under the contract in suit, plaintiff did not know whether the Pennsylvania Capital Stock Tax could properly be allocated to the cost of the operation in Illinois. A discussion in December 1943, had been had between fiscal representatives of plaintiff and defendant at Chicago, about percentage bases for allocating executive salaries to general and administrative expenses. On January 25, 1944, plaintiff's lawyers in a letter to their client admitted that (1) the earnings of the Illinois plant and (2) corporate dividends solely resulting therefrom were factors in measuring the taxable value of plaintiff's capital stock, to such extent that, even if plaintiff had no property in Pennsylvania, it would still have to pay the tax in Pennsylvania as measured by those two factors. The rehabilitation of the Illinois plant was financed wholly with Government money and the Illinois plant tools and equipment were Government owned. In their letter plaintiff's lawyers stated their opinion that the capital stock tax was not a property tax but was a "franchise" tax.

18. The State of Pennsylvania had in operation from May 16, 1935 a franchise tax, to which plaintiff was subject, separate and apart from the capital stock tax.

19. Plaintiff in the late winter, or early spring of 1944, submitted to defendant, for the first time, varying amounts of the Pennsylvania Capital Stock Tax as a part of its general and administrative expenses for 1942 and 1943, allocated to the contract on various suggested bases, and enclosed in support a copy of a legal opinion from its attorney dated January 25, 1944.

The Judge Advocate General of the Army and the Legal Branch of Office of Chief of Ordnance rejected plaintiff's proposals on the ground that due to the nature of the tax in relation to the performance of the contract in Illinois, the

tax was not a reimbursable item on any basis of allocation. On September 5, 1944 plaintiff was so advised and told by defendant that, if plaintiff wished to pursue the matter of the tax reimbursability further, it would have to submit a formal public voucher.

Negotiations then commenced between H. J. Gearhart, plaintiff's treasurer, and Capt. Robert D. Hummer, the contracting officer's representative for defendant, with respect to general and administrative expenses to be allocated to the contract, with the result that, under date of December 27, 1944, specified allocable percentages of executive salaries were agreed upon and items of admissible general and administrative expense were to be allocated to the contract on the basis of the ratio of the Hegewisch direct labor and factory overhead to plaintiff's total and direct labor and factory overhead excluding from such factory overhead general and administrative expense. It was then mutually agreed "that the amount of Federal and State capital stock taxes chargeable against this contract shall be handled as a separate matter."

20. The public voucher for the allocated portion of the Pennsylvania Capital Stock Tax of $73,594.71 was sent to the office of the Chicago Ordnance District where the amount claimed was reduced to $71,497.64, by eliminating termination charges. The contracting officer's representative in Chicago, Major Hummer, signed the certificate for goods received or services performed in the printed form as approved for $71,497.64. Major Hummer's signature meant that the contracting officer's representative had found that the Pennsylvania Capital Stock Tax had been paid and that the allocation involved was fair and reasonable.

Lee M. Thurston was the contracting officer. Plaintiff addressed the voucher to the Comptroller General. He knew that the Chief of Ordnance had previously ruled that the Pennsylvania Capital Stock Tax was not reimbursable.

21. The public voucher was transmitted some time after June 1946 to the Office of Chief of Ordnance in Washington, D. C., for submission to the Comptroller General.

Pending a review of the voucher by the Office of Chief of Ordnance, plaintiff and defendant entered into further discussions with respect to the exclusion from the termina-

tion settlement of the items of the Pennsylvania Capital Stock Tax and two items of general and administrative expenses, resulting in an agreement known as Supplement 104 to the contract which provided for a further payment by defendant to plaintiff of $73,161.48 in liquidation of all unliquidated payments, interest, and other claims of plaintiff under the contract and under the Contract Settlement Act, except for plaintiff's claim of $73,594.71 with respect to the Pennsylvania Capital Stock Tax, which item was stated to be "subject to a ruling by the Comptroller General" and that payment to the plaintiff would be "subject to the ruling of the Comptroller General."

22. On September 26, 1946, the Comptroller General published an opinion known as the *McLarren* decision in which he returned to the War Department without decision a reimbursement public voucher under a cost-plus-fixed-fee contract for the stated reason that, the contract having been terminated, there was no provision in the Contract Settlement Act or the Joint Termination Regulations for presentation of such (reclaim) voucher to the General Accounting Office. The officers of the Office of Chief of Ordnance concluded that the *McLarren* decision foreclosed submission to the Comptroller General of claim (or reclaim) vouchers on excepted items from joint termination settlements, including plaintiff's public voucher of June 27, 1946. Consequently the Office of Chief of Ordnance in Washington returned plaintiff's public voucher to the Chicago Ordnance District for final decision by the contracting officer. In returning the public voucher to the Chicago Ordnance District, the Office of Chief of Ordnance in Washington stated in effect that such office was of the opinion that the claim should be denied.

23. Having had the matter under consideration since on or about October 8, 1947, the contracting officer, Lee M. Thurston, under date of February 9, 1948, made his finding and decision by letter sent by registered mail to the plaintiff corporation, as follows:

> GENTLEMEN: Pursuant to the Contract Settlement Act and the appropriate provisions of the Joint Termination Regulations, the Contracting Officer herewith makes the following determinations and findings with reference to

reimbursement for Pennsylvania Capital Stock Tax under the provisions of Title IV, Article IV–A of the subject cost-plus-a-fixed-fee contract, in an amount of $73,594.71—such amount being the percentage of such tax claimed to be applicable to United States contracts.

Supplemental Agreement No. 104, providing for the termination of subject contract, excepted from such termination "All rights and obligations of the parties, if any, with respect to the Pennsylvania Capital Stock Tax, not to exceed $73,594.71, which item is subject to a ruling by the Comptroller General. Payment to the Contractor will be subject to the ruling of the Comptroller General". Inasmuch as this item was excluded from the final settlement agreement, the Comptroller General has ruled that all such items are for the determination by the Contracting Officer and the Comptroller General has no jurisdiction in such matters.

Pursuant to the above, the Contracting Officer herewith finds that the contractor is not entitled to any reimbursement for the payment of the Pennsylvania Capital Stock Tax. In support of such unilateral determination, the undersigned Contracting Officer makes the following findings:

1. Article IV–A of Title IV of subject contract provides for the type of costs subject to reimbursement. Provisions relied upon by contractor as justifying reimbursement and other provisions pertinent to the reimbursability or non-reimbursability of the item in question are as follows:

> [The letter cites and quotes in full Article IV–A 1 (a) (3) *d* and *f* iv and v; Art. IV–A 1 (a) (4), (7) *d* iii and (9);]

* * * * *

2. * * * In all of such provisions the common factor of applicability is based on the cost being incident to, necessary in, and used for the performing of this contract. This criteria is clearly set forth as being the controlling element in reimbursement of costs under the said contract.

3. Article IV–A 1.(a) (7) *d* iii, in setting up items not compensable under this contract, lists various items of expenditures ordinarily incurred in the operation of a business which, however, are not to be considered reimbursable under the cost-plus-a-fixed-fee contract. This indicates that not all general expenditures are considered as being allocable to the performance of such contract. In addition, Article IV–A 1. (a) (9) specifically excepts from the allocation of direct costs "all

items which have no relation to the performance of this contract". Basically, therefore, the contract provides for reimbursement for all expenditures incurred in aid of the performance of this contract, and excepts general expenditures chargeable to the business as a whole but which served no function in specifically promoting the purposes of this contract.

4. In this instance the Capital Stock Tax is assessed against the contractor as an incident to being located in the Commonwealth of Pennsylvania. While the principal office and other operating plants of the contractor are located there, the Hegewisch plant in the State of Illinois was the plant designated as the place where work under subject contract was performed. Inasmuch as the work was done outside of the taxing jurisdiction, the Pennsylvania Capital Stock Tax cannot be considered as being a charge allocable to this contract as being necessarily incident to the performance of such contract.

5. Article IV-A 1. (a) (9) as set forth above states that a determination of the allocation of indirect costs depends upon all the facts and circumstances relating to the performance of the contract and is subject to the requirement that all items which have no relation to the performance of this contract shall be eliminated.

In view of the above it is the finding of the Contracting Officer that the item of Pennsylvania Capital Stock Tax has no relation to the performance of this contract, and inasmuch as the said tax is not reimbursable as a property tax, not being incident to the property used for manufacturing purposes of this contract, claim for reimbursement under the provisions of Title IV of subject contract in the sum of $73,594.71 is denied.

In the event you are dissatisfied with the foregoing findings and the unilateral determination herein made, you may appeal from such findings and decision of the Contracting Officer in accordance with the provisions for such appeal contained in Section 13 (a) of the Contract Settlement Act and Section 755 of the Joint Termination Regulations.

Plaintiff filed no appeal from the contracting officer's findings and decision.

24. Plaintiff took Federal income tax deductions for the Pennsylvania Capital Stock Taxes it paid to the Commonwealth of Pennsylvania for the years 1942, 1943, 1944, and 1945; the amounts of such deductions finally allowed by the United States Treasury Department are the amounts with

additional assessments as actually paid to the Commonwealth of Pennsylvania; and they include the amounts totaling $73,594.71 claimed by plaintiff in its public voucher dated June 27, 1946, in Supplement 104 dated November 27, 1946 and in its petition.

25. For the taxable years 1942 to 1945, inclusive, plaintiff, as it was required to do by the Pennsylvania taxing statute, paid to the Commonwealth of Pennsylvania the following capital stock taxes:

	A Initial payments	B Additional assessments	C Total payments
1942	$35,080.13	$4,385.02	$39,465.15
1943	36,102.15		36,102.15
1944	31,217.61	12,140.18	43,357.79
1945	34,027.02	19,140.20	53,167.22

26. The amount of the item in dispute in this suit was computed by applying to the amounts of taxes paid initially as shown in Finding 25 (Column A) above with respect to the years 1943, 1944 and 1945 and the amount of $39,465.15, the total of the payments made with respect to the year 1942 (Column C), the allocating percentages derived from the ratio of the total of Armored Tank Division direct labor and factory overhead to the total of all direct labor and factory overhead incurred in all of plaintiff's operations. The following shows the computation:

1942—39.35% ×$39,465.15=$15,529.54
1943—58.717% ×$36,102.15=$21,195.58
1944—62.45% ×$31,217.61=$19,485.39
1945—51.06% ×$34,027.02=$17,374.20

Total ——— $73,594.71

Although the Department of Revenue of the Commonwealth of Pennsylvania later increased the amounts of the plaintiff's capital stock tax, the plaintiff, under Supplement 104, agreed to limit its claims with respect to reimbursement of Pennsylvania Capital Stock Taxes to $73,594.71 and, in this proceeding, makes no claim for reimbursement of any portion of such taxes paid in excess of that amount.

27. Personnel in the office of the Chief of Ordnance who were familiar with the *McLarren* decision felt that the transmittal of plaintiff's public voucher to the Comptroller General would be of no avail since, in their opinion, the Comptroller General would return it without issuing any ruling other than to state he had no jurisdiction. Accordingly, the public voucher was returned to the originating installation, the Chicago Ordnance District, and never submitted to the Comptroller General.

28. It was plaintiff's understanding, as indicated in paragraph 11 of the petition, that the Comptroller General of the United States had actually refused to rule on its claim and plaintiff was unaware that the claim had never been submitted to the Comptroller General.

At a pre-trial conference held under date of August 12, 1954, it was brought to the attention of plaintiff for the first time that its claim had not been submitted to the Comptroller General for a ruling. At that point it was agreed that an attempt would be made to obtain a ruling on the claim from the Comptroller General. This proposal was acceptable to both plaintiff and defendant as it would, if successful, effectively dispose of this proceeding. Accordingly, on October 2, 1954, plaintiff, through its counsel, submitted its claim again to the office of the Chief of Ordnance. On December 23, 1954, such claim was transmitted by Robert T. Stevens, Secretary of the Army, to the Comptroller General with a request that an advance decision be made thereon. On February 11, 1955, Frank H. Weitzel, Assistant Comptroller General, advised Mr. Stevens by letter that the request for a decision under the terms of article 11 of Supplement 104 was "declined". The case then proceeded to trial.

29. The Capital Stock Tax imposed by the State of Pennsylvania on plaintiff during the years 1942 to 1945, both inclusive, is a tax levied upon each business incorporated under the laws of such state, and certain other similar business organizations, at the rate of five mills upon each dollar of the actual value of its whole capital stock. The actual value of the stock is ascertained in accordance with a method set forth in the taxing statute. Such statute provides that the actual value in cash of the capital stock as it existed at the close of

the taxable year is to be appraised by two officers of the corporation but that such appraised value shall not be less than (a) the average selling price of such stock during such year, (b) the price or value indicated by the net earnings or the amount of profit made, or (c) the value indicated by the intrinsic value of its tangible property and assets and of its good will, franchise and privileges, taking into consideration the amount of indebtedness of the corporation. The taxing statute provides exemptions for the value of property owned, directly or indirectly, by the corporation and located outside the Commonwealth, and directs that so much of the value of such out-of-state property shall be exempted or relieved from the capital stock tax in the proportion which the value of such out-of-state assets bears to the value of the total assets owned by the corporation.

30. The Supreme Court of Pennsylvania has held that the tax is a tax on the property and assets of the corporation at a value based on the value of the capital stock rather than upon the specific asset values of the property taxed: *Commonwealth of Pennsylvania* v. *Standard Oil Company*, 101 Pa. 119 (1882).

The tax applies only to domestic corporations (i. e., those incorporated in Pennsylvania) and such other domestic organizations as have characteristics similar to those of a corporation, such as joint stock associations, limited partnerships and companies. Section 1704 of the Fiscal Code of the Commonwealth of Pennsylvania (Act of April 9, 1929, P. L. 343, Article XVII, Section 1704; as amended) authorizes the Governor of Pennsylvania to forfeit the charter of a domestic corporation which does not comply with the reporting requirements of various tax statutes of the State.

31. Plaintiff's books were maintained in accordance with the accrual system of accounting. The resettlement as to 1942 was made in 1945 and the resettlements as to 1943, 1944 and 1945 were made in 1949.

32. The plaintiff insists that the Pennsylvania Capital Stock Taxes which were incurred for the years 1942 to 1945, inclusive, to the extent of the proportion thereof computed on the basis of the allocating percentages specified in Finding 26 (but not exceeding an aggregate amount of $73,594.71),

were (1) reimbursable to plaintiff by defendant pursuant to either Article IV-A 1 (a) (3) *f.* iv. as a pro rata share of recurring charges with respect to property used for manufacturing purposes of the contract, such as property taxes, or (2) pursuant to Article IV-A 1 (a) (1) (7) as a reasonable proportion of management expenses, i. e., "overhead" expenses incurred in connection with the general administration of the business in accordance with the provisions of Article IV-A 1 (a) (9) *c.*

33. Under the system of accounting used by plaintiff in the keeping of its books of account, the Pennsylvania Capital Stock Taxes here involved were recorded on its books, maintained at its Pittsburgh office, as general and administrative expense. Witnesses who testified on the subject were not familiar with any other method of recording such taxes and considered this manner of treating such taxes as proper.

Plaintiff, in submitting its invoices for reimbursement of a proportionate amount of Pennsylvania Capital Stock Taxes was acting in accordance with a procedure suggested on behalf of defendant.

34. The War Department in TM-14-1000, dated September 1, 1945, authorized changes in Administrative Audit Procedures for Cost-Plus-A-Fixed-Fee Supply Contracts as follows:

> 266. State franchise taxes levied for the privilege of doing business, including those computed on a net income base, are reimbursable costs under CPFF contracts. However, state income and excess profits taxes are not reimbursable costs.
>
> 267. The tax will be prorated in equal amounts per month over the period to which the privilege applies, namely, the privilege year. When it is necessary to allocate a franchise tax between CPFF contracts and other work, the basis for the allocation of general administrative expenses will be used.
>
> 268. Taxes imposed by the following states and statutes have been classified below as (1) franchise taxes which are reimbursable as costs and (2) income and excess profits taxes which are not reimbursable:

List of States and statutes imposing (1) Reimbursable franchise taxes and (2) Nonreimbursable income and excess profits taxes

State	Reimbursable	Not reimbursable	Statute
•	•	•	• •
Pennsylvania	1		Corporate Net Income (Franchise) Tax Act. Purdon's Pennsylvania Statutes, Title 72[1] Ch. 2, Secs. 3420a–3420n.
	1		Purdon's Pennsylvania Statutes, Title 72, Ch. 2, Sec. 1871 et seq.
•	•	•	• •

[1] The statute referred to in the quotation in Finding 38 as "Purdon's Pennsylvania Statutes Title 72, Ch. 2, Sec. 1871 et seq." is the statute imposing the Pennsylvania Capital Stock Taxes incurred and paid by plaintiff for the years 1942 to 1945, inclusive, and the relevant portion thereof is reproduced in the record on pages 3 and 4 of plaintiff's Exhibit 5.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

"T. D. 5000"

TITLE 26 — INTERNAL REVENUE. — CHAPTER I, SUBCHAPTER A, PART 26.— EXCESS PROFITS IN CONTRACTS FOR NAVAL VESSELS AND ARMY AND NAVY AIRCRAFT.

Regulations under section 2(b) of the Act of June 28, 1940, and other provisions.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE TREASURY,
Washington, D. C.

WAR DEPARTMENT,
OFFICE OF THE SECRETARY OF WAR,
Washington, D. C.

NAVY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE NAVY,
Washington, D. C.

To the Officers and Employees of the Treasury Department, the War Department, the Navy Department, and Others Concerned:

* * * * * * * * * * *

"Pursuant to the authority prescribed by section 2(b) of the Act of June 28, 1940 (Public, No. 671, Seventy-sixth Congress, third session), section 14 of the Act of April 3, 1939, and section 3 of the Act of March 27, 1934, as amended, the following regulations are hereby prescribed:

* * * * * * * * * * *

"Sec. 26.9. *Cost of performing a contract or subcontract.*—(a) *General rule.*—

The cost of performing a particular contract or subcontract shall be the sum of (1) the direct costs, including

therein expenditures for materials, direct labor and direct expenses, incurred by the contracting party in performing the contract or subcontract; and (2) the proper proportion of any direct costs (including therein a reasonable proportion of management expenses) incident to and necessary for the performance of the contract or subcontract.

(b) Elements of cost. — No definitions of the elements of cost may be stated which are of invariable application to all contractors and subcontractors. In general, the elements of cost may be defined for purposes of the Act as follows:

(1) Manufacturing cost, which is the sum of factory cost (see paragraph *(c)* of this section) and other manufacturing cost (see paragraph *(d)* of this section);

(2) Miscellaneous direct expenses (see paragraph *(e)* of this section);

(3) General expenses, which are the sum of indirect engineering expenses, usually termed 'engineering overhead' (see paragraph *(f)* of this section) and expenses of distribution, servicing and administration (see paragraph *(g)* of this section);

* * * * * * * * * * *

"*(g) Expenses of distribution, and administration.* —Expenses of distribution, servicing, and administration, which are treated in this section as a part of general expenses in determining the cost of performing a contract or subcontract (see paragraph *(b)* of this section), comprehend the expenses incident to and necessary for the performance of the contract or subcontract, which are incurred in connection with the distribution and

general servicing of the contracting party's products and the general administration of the business, such as—

"*(1) Compensation for personal services of employees.*—

* * * * * * * * * * *

"*(2) Bidding and general selling expenses.*—

* * * * * * * * * * *

"*(3) General servicing expenses.*—

* * * * * * * * * * *

"*(4) Other expenses.*—

* * * * * * * * * * *

"Allowances for interest on invested capital are not allowable as costs of performing a contract or subcontract.

"Among the items which shall not be included as a part of the cost of performing a contract or subcontract or considered in determining such cost, are the following:

* * * * * * * * * * *

"Federal and State income and excess-profits taxes and surtaxes; . . .

* * * * * * * * * * *

"taxes and expenses on issues and trasfers of capital stock; . . .

* * * * * * * * * * *

"*(j) Allocation of indirect costs.*—No general rule applicable to all cases may be stated for ascertaining the proper proportion of the indirect costs to be allocated to the cost of performing a particular contract or subcontract. Such proper proportion depends upon all the facts and circumstances relating to the performance of the particular contract or subcontract. Subject to a requirement that all items which have no relation

to the performance of the contract or subcontract shall be eliminated from the amount to be allocated, the following methods of allocation are outlined as acceptable in a majority of cases.

* * * * * * * * * * *

"(3) *Administrative expenses (or 'overhead').*— The allowable expenses of administration (see paragraph *(g)* of this section) or other general expenses except indirect engineering expenses, bidding and general selling expenses, and general servicing expenses shall ordinarily be allocated or distributed to the cost of performing a contract or subcontract on the basis of the proportion which the sum of the manufacturing cost (see paragraph *(b)* of this section) and the cost of installation and construction (see paragraph *(e)* of this section) attributable to the particular contract or subcontract bears to the sum of the total manufacturing cost and the total cost of installation and construction during the period within which the contract or subcontract is performed, . . ."

* * * * * * * * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 923

PRESSED STEEL CAR COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. App. 1–4) is reported at 157 F. Supp. 950. The court's findings of fact and conclusions of law (Pet. App. 4–22) are unreported.

JURISDICTION

The judgment of the Court of Claims dismissing the petition in that court was entered on January 15, 1958. The petition for a writ of certiorari was filed on April 15, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether Pennsylvania capital stock taxes, paid by a Pennsylvania corporation, are reimbursable under

a cost plus a fixed fee contract which was performed wholly in Illinois.

STATEMENT

This action was brought under the Tucker Act to recover, as allegedly reimbursable costs under a cost plus a fixed fee contract which was performed wholly in Illinois, certain Pennsylvania capital stock taxes paid by petitioner, a Pennsylvania corporation. The relevant facts may be summarized as follows:

On November 12, 1941, petitioner contracted with the Government to manufacture 900 M–4 tanks (F. 2)[1] at its Hegewisch, Illinois, plant, which the Government rehabilitated for petitioner (F. 3). Under the terms of the contract, petitioner was to be reimbursed by the Government for all direct costs and for "the proper proportion of any indirect cost . . . incident to and necessary for the performance of" the contract (F. 6, Art. IV, 1 (a) (1)). Property taxes, covering "property used for manufacturing purposes" in the performance of the contract were expressly included as "indirect" costs and were therefore pro rata reimbursable (F. 6, Art. IV, 1 (a) (3) (f) (iv)). On the other hand, federal and state income and excess profits taxes, and taxes on issues and transfers of capital stock, were expressly non-reimbursable costs (F. 6, Art. IV, 1 (a) (7) (d) (iii)).

The contract made no specific reference to the tax

[1] This prime contract was supplemented a number of times so that petitioner manufactured approximately 10,000 tanks prior to termination in 1945 (F. 3).

Court of Claims findings, which are reprinted in the Appendix to the Petition, will be cited by the number of the finding.

imposed by the state of Pennsylvania on the capital stock of, *inter alia,* corporations incorporated in that state, Purdon's Penna. Stat., Title 72, Ch. 2, Sections 1871–1903 (F. 8, 11). In computing this tax, the value of the capital stock of the corporation is determined by a number of formulae based on the average selling price of the stock, corporate earnings, and the "intrinsic value" of corporate assets (F. 11, 29). This value, which in petitioner's case was based partly on the earnings from its Government contract (F. 16), is then apportioned between "taxable" assets and "exempt" assets, one of which is tangible property located outside Pennsylvania. Therefore, petitioner's Hegewisch plant was exempted and a proportionate part of the value of the capital stock was relieved from taxation.

Although petitioner filed capital stock tax returns, and made payment of the tax, for the years 1941, 1942 and 1943, it never requested reimbursement until early in 1944, at which time it submitted claims for capital stock taxes as part of its general and administrative expenses for 1942 and 1943 (F. 19). On September 5, 1944, petitioner was advised by the Army that its claim was rejected (F. 19).

On June 1, 1945, the Government issued a notice of partial termination of the contract. The notice of complete termination followed on August 17, 1945, and on October 10, 1945, the Government terminated all research and development work effective December 31, 1945 (Def. Exh. 10, p. 3).

On July 2, 1946, the parties reached a termination settlement agreement, contained in a formal Termination Settlement Recommendation dated July 22,

1946, which excepted the Pennsylvania capital stock tax reimbursement matter from settlement pending a ruling of the Comptroller General (Def. Exh. 10, p. 8). This agreement, which was reiterated in Supplemental Settlement Agreement No. 104 of November 27, 1946 (F. 9), did not specify which of the parties was to apply for the ruling (*id.*, Art. 3 (c) (11)).

On September 26, 1946, two months before the Supplemental Settlement Agreement No. 104, the Comptroller General declined, for lack of jurisdiction, to decide whether certain gas-gathering taxes were reimbursable under a cost-plus-a-fixed-fee contract where the contract was already terminated (F. 22; 26 Comp. Gen. 216). The Office of the Chief of Ordnance in Washington, believing that this decision controlled petitioner's reimbursement claim, returned petitioner's voucher to the Chicago Ordnance District without submitting it to the Comptroller General (F. 22, 27). On February 9, 1948, the contracting officer denied petitioner's claim for reimbursement on the ground that "[i]nasmuch as the work was done outside of the taxing jurisdiction, the Pennsylvania Capital Stock Tax cannot be considered as being a charge allocable to this contract as being necessarily incident to the performance of such contract" (F. 23). Petitioner filed no administrative appeal from this denial (F. 23).

Petitioner thereupon filed its petition in the Court of Claims. The petition disclosed to the Government for the first time that petitioner believed that the Comptroller General had refused to decide whether

the Pennsylvania capital stock taxes were reimbursable costs. Since the question had never, in fact, been presented to the Comptroller General, the parties agreed to forward the claim to him before proceeding to trial. The Comptroller General, however, declined to take jurisdiction of the question (F. 28).

At trial, the Government introduced the testimony of the commanding officer of the Chicago Ordnance District in 1941, a member of the Chicago Ordnance District legal staff who had been one of the negotiators of the tank contract, and the Chief of the Legal Division of the Chicago Ordnance District at the time of the contract (R. 322, 358, 373). Each of these witnesses testified that he first heard of the Pennsylvania capital stock tax a few weeks prior to the trial in June, 1955 (R. 339, 361, 374). Petitioner introduced no testimony that the reimbursability of Pennsylvania capital stock taxes had been discussed during the negotiations for the contract.

The Court of Claims dismissed the petition (Pet. App. 1–4). Pointing to the fact that the capital stock tax paid by petitioner had been "based roughly upon that part of the market value of [its] stock which was created by the profits made by the operations of [its] plant in Pennsylvania and the value of the physical assets of [that] plant," the court determined that neither had a relation to the performance, or cost of the performance, of the contract with the Government (Pet. App. 3). It concluded (*ibid.*):

> It is not conceivable that if the parties, in negotiating the terms of the contract, had put their minds upon the question which faces us

here, and had analyzed the nature and operation of the Pennsylvania Capital Stock Tax, they would have agreed that it should be a reimbursable cost of the performance of the Illinois contract. The language of the contract is, at best, barely susceptible of an interpretation which would include this tax as a reimbursable cost. We should not so interpret it as to make a contract for the parties which, we are satisfied, they would not knowingly have made for themselves.

ARGUMENT

The court below has held that petitioner's contract with the Government did not entitle it to recover, as a reimbursable cost, its payment of the Pennsylvania capital stock tax. That holding, which rested upon the peculiar nature of the tax and the particular facts of the case, is clearly correct and presents no question of general importance. Moreover, there is no conflict of decisions. Accordingly, further review is not warranted.

1. As the court below observed, the Pennsylvania capital stock tax payments for which petitioner seeks reimbursement under its cost-plus-a-fixed-fee contract had no relation to the performance, in Illinois, of that contract. The Pennsylvania Supreme Court has repeatedly held that the capital stock tax is not a franchise or privilege tax but is, rather, a tax upon property or assets. See, *e. g.*, *Commonwealth* v. *Standard Oil Co.*, 101 Pa. 119; *Commonwealth* v. *Union Shipbuilding Co.*, 271 Pa. 403, 114 A. 257; *Commonwealth* v. *Southern Pennsylvania Bus Co.*, 339 Pa. 521, 15 A.

2d 375.[2] Referring to the *Standard Oil* decision, this Court itself has described the capital stock tax "as in substance and fact, though not in form, a tax specifically levied upon the property of the corporation." *Delaware, Lackawanna & Western R. Co.* v. *Pennsylvania,* 198 U. S. 341, 353, 356. And, the Pennsylvania court having also held that the tax is imposed only with respect to property which is located in Pennsylvania (*Commonwealth* v. *Union Shipbuilding Co., supra.*), the Illinois property employed by petitioner in carrying out the contract was exempt.

Since the Government negotiators were unaware of even the existence of the capital stock tax,[3] the contract did not make specific mention of it. It is nevertheless clear, as the court below determined, that had consideration been given to the tax it would not have been included as a reimbursable cost. Section 1 (a) (1), Article IV, of the contract provides that, in determining the cost of performance, "the proper proportion of any indirect costs * * * *incident to and necessary for* the performance of [the] contract" shall be allowed. (Emphasis added.) It follows from this provision that the Government did not contemplate the reimbursement of non-incidental expenditures such as the capital stock tax. There is, of course, no reason why reimbursement of such an expenditure would be contemplated.

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[2] Pennsylvania has a separate and distinct franchise tax "for the privilege of doing business in this Commonwealth." See Purdon's Penna. Stat., Title 72, Ch. 2, Sections 3420a–3420n.

[3] The contract was negotiated on the Government's behalf by the Chicago Ordnance District (R. 329), which does not encompass Pennsylvania (R. 324).

2. Petitioner's argument that *North American Aviation, Inc.* v. *United States*, 67 F. Supp. 1077, 107 C. Cls. 69, is inconsistent with the holding below is plainly without merit. In the first place, the *North American* case involved the federal capital stock tax "imposed upon every foreign corporation with respect to carrying on or doing business" (26 U. S. C. (1940 ed.) 1200 (b)).[4] It was thus, unlike the Pennsylvania tax, an excise levy imposed for the privilege of doing business, *i. e.*, a franchise tax. See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. As such, its payment was necessary to the performance of North American's contract and, therefore, was a reimbursable cost.

Moreover, the contract provisions and the background of the negotiations in *North American*, relied upon by the Court of Claims in that case, were markedly different from those here. The North American contract expressly incorporated Treasury Decision 5000 (Internal Revenue Cumulative Bulletin, 1940–2, p. 397), which determined that "excise taxes with respect to the carrying on or doing business * * * constitute proper reimbursable items of cost of performance of cost-plus contracts," 67 F. Supp. 1007 at 1015. Consequently, as the Court of Claims held, the parties had agreed in effect that the contractor was to obtain reimbursement of the federal tax. In this connection, the court found that "the parties * * * were fully

[4] Repealed by Revenue Act of November 8, 1945, Ch. 453, Sec. 201, 59 Stat. 574, effective with respect to years ending after June 30, 1945.

aware of the tax and * * * had at hand all the knowledge and means necessary to place a limitation on the reimbursement for the capital stock had they desired or intended that there be such a limitation," *id.* at 1017. As has been seen, this was not true in this case.

3. Nor is there merit to petitioner's reliance on the September 14, 1945, amendment to Army Technical Manual 14–1000 concerning the audit procedures for cost-plus-a-fixed-fee contracts. In the first place, since this amendment was not issued until four years after the contract was executed, it has no bearing upon the intent of the negotiators. Moreover, the amendment, which erroneously listed the Pennsylvania capital stock tax as a "state franchise tax levied for the privilege of doing business," *authorized* but did not *direct* reimbursement of state franchise taxes. Indeed, this distinction is pointed up by the digested decision in the November 1945, Bulletin of the Judge Advocate General of the Army (Vol. IV, No. 11, p. 469), relied on by petitioner (Pet. 14–15):

> *State franchise tax.*—Subject to the assumptions hereinafter expressed, *there is no objection to reimbursement*, in accordance with pars. 266 and 267, TM 14–1000, May 1945 [as added by C 2, 1 September 1945], of payments made by cost-plus-a-fixed-fee contractors on account of *true* State franchise taxes where payment of the tax is a necessary expense in connection with the performance of the contract and *where reimbursement is approved by the contracting officer.* * * * [Emphasis added.]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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May 1958